No. 80-1195

In the Supreme Court of the United States

OCTOBER TERM, 1980

GLENN H. SEWELL,

Petitioner,

v.

PHILLIPS PETROLEUM COMPANY,
a Delaware Corporation,

Respondent.

PETITIONER'S REPLY MEMORANDUM

SAMUEL KING
301 Gump & Ayers Building
2120 South 1300 East
Salt Lake City, Utah 84106
Attorney for Petitioner,

RAY R. CHRISTENSEN
DENTON M. HATCH
900 Kearns Building
Salt Lake City, Utah 84101
Attorneys for Respondent

CHRIS WANGSGARD
50 South Main
Salt Lake City, Utah 84144
Attorney for Respondent

No. 80-1195

In the Supreme Court of the United States

OCTOBER TERM, 1980

GLENN H. SEWELL,

Petitioner,

v.

PHILLIPS PETROLEUM COMPANY,
a Delaware Corporation,

Respondent,

PETITIONER'S REPLY MEMORANDUM

The issue in this case justifying review is whether respondent defrauded the Circuit Court.

Rather than meet that issue respondent's Brief in Opposition states a series of reasons why the merits need not be considered. These reasons are new matter to which this memorandum responds.

If accurate, some of respondent's reasons would be dispositive of the case. Are they accurate? Let us examine some examples.

Respondent states that the petition is from an "*untimely* motion seeking reconsideration" before the Circuit Court. (Brief in Opposition, page 2)

Was it "untimely"?

The motion was under Rule 60(b)(3) FRCP. One year is allowed for filing. It was filed August 15, 1980, six weeks before time would have run on September 28, 1980.

Clearly if the motion had not been timely, the pending petition could be denied for that single reason.

Equally clear, if respondent believed its own flat, unqualified statement of fact that the motion was "untimely", it would have submitted dates and documentation in support as it would have no easier way of prevailing here. It did not, as it knew it had no facts.

Respondent knew the calendar, was a party, and knew the facts.

It follows that respondent has misadvised this court on a matter of substance. Why?

Is it not that respondent's counsel knows that statements of simple fact by counsel are routinely taken at face value by appellate courts as a matter of credibility of counsel, and to conserve the court's time for more important matters? What though is counsel's duty?

If this reply memorandum were not filed isn't there a real possibility that the petition might have been denied on the basis that it followed an untimely motion in the lower court? Certainly, respondent took that shot and put petitioner at hazard.

This kind of calm misstatement is typical of what respondent did in the Circuit Court, and what this case is about.

Respondent also states as a basis for denial that "Nothing has happened in this case since the original petition for writ of certiorari was denied approximately one year ago. . . ." Respondent chooses to omit a vital interim development. "Nothing" is not accurate.

When the Circuit Court wrote its second opinion (Appendix C of Petition) it acknowledged that fraud had been attempted. It did not realize that the attempt had succeeded, and indicated that it would not analyze to determine that issue. Instead the Court referred the resolution of the fraud to the Utah Bar Commission.

Contrary to respondent's assertion that there is no new matter, the vital new matter is that the Bar Commission has made an exhaustive inquiry into the facts.

It issued a six page complaint against petitioner's lawyer which detailed each specific allegation of misconduct that he had made in his brief in the Circuit Court. This complaint is attached as Annex 1. It is important because of its detail on every aspect of the claims of fraud.

If petitioner's counsel had not been able to verify the accuracy of his claims he would have been sanctioned or disbarred.

Instead the Utah Bar entirely cleared him because he proved every statement he had made to be accurate and justified.

The unresolved issue of which lawyer had misled the Circuit Court having thus been resolved by the independent fact finding body in favor of petitioner, he then returned to the Circuit Court to have it correct its decision, to give him justice, and impose appropriate sanctions for its own protection as a court.

While respondent has chosen to characterize that motion vaguely as "a motion for reconsideration" the motion was squarely one based on fraud on the court. It stated as its sole basis for relief:

> "BASIS FOR MOTION"
>
> "Sewell and the Court have been defrauded by the company."
>
> "This motion is filed pursuant to Rule 60(b)(3), FRCP, and 28 USC § 1651(a)(b)."

It is humanly understandable that the Circuit Court denied the motion peremptorily and unheard. It is painful for a court to deal with this subject matter.

However, a proven claim of fraud on the court cannot be ignored. Such conduct cannot be countenanced.

Petitioner's counsel has never dealt with so distasteful a matter before. It is his duty, as it was the Circuit Courts, to protect the judicial system by persisting to correct the situation.

The Brief in Opposition states the petition does not come within Rule 19, Rules of the Supreme Court. Petitioner disagrees.

It is from the Circuit Court's failure to meet its duty, now that the fact that it was defrauded has been determined by the very fact finding body it designated, that the case falls squarely under that Rule's provision 1.(b):

> "CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI
>
> 1.(b) Where a court of appeals . . . has so far departed from the usual and accepted course of judicial proceedings . . . as to call for an exercise of this court's power of supervision."

As the Circuit Court has failed to review it is proper for this court to require review.

There is a final, new and unique matter raised in the Brief in Opposition, that must be met.

Respondent now states:

> "The sides of the excavation had not been sloped as required by local law. The legal question on which the case turned was whether the delict of the contractor, in failing to comply with applicable standards, was imputable to the respondent (owner)." (Brief in Opposition, page 2.)

Petitioner agrees with the accuracy of the above.

This material is new, and unique, because while proved at trial it is diametrically opposed to what respondent submitted to the Circuit Court.

In regard to this, please refer back to the original opinion of the Court of Appeals at Appendix A of the Petition. There, the reader will see that not a single one of those three positions was in fact conceded then.

The job was illegal because the Uniform Building Code has a mandatory requirement that excavations over 5 feet deep be sloped or shored to protect worker safety. The cave-in would not have occurred if that law had not been violated.

To the contrary, the Circuit Court makes no finding that the job was illegal, no finding that the contractor was negligent because of his violation of law, no finding that his violation was conceded to be the proximate cause of the accident, and no finding that the sole issue was whether his delict was imputable to respondent. Certainly its opinion would have included a discussion of the Uniform Building Code requirements and their application to the case if both sides, as respondent now claims, conceded its specific violation. Instead the opinion never even names the UBC. In this it adopts respondent's circuit brief which also did not cite the UBC.

To confirm petitioners position that respondent at the Circuit Court denied all of the above, nothing more is needed than to quote the opening paragraph of its brief in that court which categorically rejected petitioner's brief as follows:

> "The statement of the case contained in the appellant's brief is not complete and is replete with

> inaccuracies and statements unsupported by the record. It would serve no useful purpose to categorize these. However, in the interest of clarity and accuracy, we deem it necessary to restate the facts." (Respondent's Brief, case No. 76-1030, page 1)

It should be noted that in the whole 42 remaining pages of that brief, respondent did not cite a single instance of petitioner misstating the record. It's tactic was solely to free itself from the record, not hold petitioner to it.

Respondent's apparent purpose at this time is to now, by conceding the truth to the Supreme Court, make it appear that it had previously conceded the same matter to the Circuit Court, (and also to avoid the factual conflict that might invite review now). Had respondent done so before, the opinions of the Circuit Court would inescapably have been different.

Respondent has made a fatal error. The whole thrust of its Brief in Opposition is to avoid review as it knows such review will be adverse to it.

As a matter of tactics it has taken certain gambles, two mentioned earlier in this Memorandum — don't review as the matter is not timely, don't review because there is nothing new — while knowing these statements to be inaccurate.

Its concession of facts and legal issues we are now examing is another gamble — don't review as the same facts and issues have been previously decided.

The error is that these concessions of fact and, law impeach respondent's previous briefs in the Circuit Court. Should that court now review and compare those briefs with respondent's admissions here, it will find them utterly incompatible and, it is hoped, act accordingly.

CONCLUSION

Respondent is seeking to wrongfully manipulate this court, as it did the Circuit Court. What will be the result?

Petitioner recognizes the difficulty in having a writ of certiorari issue in any case as the Court is so overburdened. While he hopes the writ will issue here, he is confident that justice will be served if an Order of this Court issues overturning the Circuit Court's two judge denial of his 60(b)(3), FRCP, motion, and returning it to that court for a full en banc hearing.

Petitioner prays for relief in such form as the Court deems appropriate.

Respectfully submitted,

SAMUEL KING
301 Gump & Ayers Building
2120 South 1300 East
Salt Lake City, Utah 84106
Counsel for Petitioner

March 3, 1981

ANNEX

COMPLAINT OF THE ETHICS AND DISCIPLINE COMMITTEE OF THE UTAH STATE BAR

TO: Samuel King

The Ethics and Discipline Committee of the Utah State Bar hereby complains against Samuel King in accordance with the Revised Rules of Discipline of the Utah State Bar and accuses him of violation of the Revised Rules of Conduct of the Utah State Bar in that he filed a brief for appellant in the case of Sewell vs. Phillips Petroleum Company, No. C77-2072, before the United States Court of Appeals for the 10th Circuit, which brief included statements to the effect that counsel for the appellee had deliberately misstated material facts with the intent of deceiving the court thereby, in the prior appeal on the same matter. Said statements include, but are not limited to, the following contained in the brief submitted by Mr. King:

> At no point in its brief did the Company actually show any actual misstatement of the transcript by plaintiff. Rather, it tarred plaintiff with a broad brush and submitted its own entire statement of fact,
>
> . . .
>
> By this categorical, rather than specific, substitution of the fact situation, the Company freed itself from responding to the record as cited by plaintiff, and so put itself in a position where it could use the record without regard to the evidence on which the jury verdict rested.

This is a poor practice for a respondent on appeal because it puts the reviewing court at sea as what the real evidence is. . . . (Page 3)

That the circuit court was thus grievously misled by the Company can be shown by a couple of preliminary examples. (Page 4)

The Company's device was very similar to a party arguing to an appellate court that who is responsible for an intersection accident was entirely a matter of judgment of the fact situation, while withholding from the appellate court that he had stipulated in open court that there was a stop sign which he had run, with his liability based on breach of his statutory duty.

The Company's vehicle to accomplish this deception was its categorical denial of the statement of facts in plaintiff's brief, . . . (Page 5)

The degree to which the Circuit Court was misled in its view of the facts can be measured by this divergence in view point as to Instruction #18. (Page 6)

The Company found Instruction #18 to be so entirely appropriate to the actual facts and law, that it neither objected to any facts in that Instruction at trial, nor raised it as a point on its appeal.

. . .

This illustrates the great gap between the true facts, and those the Company submitted on appeal, as the Company would surely have argued that Instruction on Appeal, if such had been as wrong as the Circuit Court thought. (Page 7)

The logical inference was that the Company's

motion was made for the purpose of putting plaintiff to delay and expense as the motion had no merit as shown by its own citations.

Third, there was another instance of the Company misleading the Circuit Court. It made a major argument in its brief that plaintiff was barred from proceeding against it because plaintiff's sole remedy was workmen's compensation. . . . (Page 8)

It might have been proper for the Company to raise that issue on appeal, but it certainly had, and breached, a duty to let the reviewing court know that it had waived the same issue at the trial level. . . . (Page 9)

1. Judge Anderson's opinion makes it clear that the actual trial evidence supports plaintiff, and the Company's brief, on which the Circuit Court opinion relies is basically false. (Page 11)

. . . limiting in its brief, the scope of reference to those "who saw" is a calculated tool for evasion.

Next question, how to get around the testimony of the witnesses hostile to plaintiff, Mr. Neuzil and Mr. Patience?

Answer: As they favored the Company and so also gave testimony favoring the Company, cite only their favorable testimony, omit all reference to their admission against interest and state without reservation, "everyone who saw the excavation thought it was safe." (Page 19)

There is a line, thin but real, which counsel should never cross. On the one side is fighting hard for a client. On the other is stopping at

nothing in order to win. Here, the Company has crossed that line.

. . .

This is not a game. A man has received permanent injuries. Through punitive damages, he seeks to stop the work practice.

What justifies the Company in saying categorically that the cave-in cause was unknown when the cause was clearly established by testimony the Company itself confirmed?

The Company's reason seems to be that if it had advised the Circuit Court about the real cave-in cause, about the real safety of the job site, that the Circuit Court might well have written a different opinion. Rather than risk that, the Company withheld all mention of "cause" testimony. (Pages 20-21)

Again, if the Company admits it knew the work and knew the work was illegal, it would probably lose on appeal.

Its own people had given the incriminating testimony.

How then to evade?

Answer: Pose the question of knowledge of law as a hypothetical, and couch it in language indicating the Company had "never engaged" in that type of work, so that the posture of ignorance of law seems plausible, "no reason to know." Once again though, it just isn't so. The Company's statement is entirely false except for one point — ten thousand gallon tanks had always been installed by independent contractors. (Pages 23-24)

In other words, the impression given by the Company in its brief is false as it was its admitted and unarguable intent to violate the safety laws, judged by its actual performance. (Page 27)

It is hypocrisy for the Company to stand before the appellate court and say it relied on the contract, when its own Mr. Howell thought illegal, i.e., vertical was the way the jobs were supposed to be? (Page 31)

. . . the Company in its original brief on appeal, presented the issue of workmen's compensation as a live issue. . . . By so doing, it intentionally suppressed the fact that it had waived this issue at trial . . . and that it was no longer before the court. (Page 49)

Actually, the Company went further and intentionally lied in areas where the evidence was undisputed. An example is the Company is saying it did't know UBC and OSHA requirements. This was an unqualified lie as its executives had testified that they did know.

. . .

The attorney has duties both to its client and to the system of justice. Which is paramount?

His first duty is to the law. He may not fight for his client to the point where he cheats to win. At that point, he is destroying the system he is part of. He is causing injustice to the other party. (Pages 50-51)

The Company falsely alleged:

1. Its own ignorance of the trade;

2. Its own ignorance of the Uniform Building Code and OSHA in general;

3. Its own ignorance of the specific violations of the Uniform Building Code and OSHA;

4. Its own reliance on the contractor to comply with appropriate regulations.

In all of the above, the Company had succeeded in pursuading the Circuit Court. The evidence given in the preliminary statement and statement of facts herein, though, shows that such representations were entirely contrary to the evidence.

5. Proximate Cause. Falsely attacked as there being no evidence in the record of the cause of cave-in. Effect was that proximate cause might not be established. Company did not succeed in pursuading Circuit Court on this point.

6. Workmen's Compensation as a live issue. This was false as the Company had waived the issue at pre-trial and never raised it again until after adverse verdict. The Company did not succeed as the Circuit Court didn't rule for it on the issue, but the effort was made. Another way of winning contra to the facts.

7. Denied its own active participation in leading contractor to violate the law. This goes to a kind of control; not active day-to-day control, but control of the situation. This is done by the contract providing that it provides for "all necessary work and materials" other than extras that arise on the job. By inspecting illegally done work and approving it, by paying for illegally done work when contractually required excavation permit is not submitted, by basing its bids and work diagrams on illegal work rather than

including sloping or shoring, it left the contractors in a position where they had to go illegally to get in to do the jobs.

8. Withholding from the Circuit Court all mention of the specific code violations, instead referring vaguely to local ordinances which had real application, but were "technically required." . . . this effort succeeded as Circuit Court did not deal squarely with the issue of violation of 5' grading requirements.

In sum, on every critical issue of fact and law, the Company created its own record and submitted inappropriate law. The calculatedness of such an effort is a patent contempt. (Pages 52-53)

Said brief and the opinion of the 10th Circuit Court in this matter are attached hereto and incorporated herein as part of this complaint.

The Ethics and Discipline Committee contends that the aforesaid conduct may constitute violations of the Revised Rules of Conduct of the Utah State Bar, Rule IV, Canon 1, DR 1-102(A) (4), (5) and (6) and/or DR 1-103(A).

Dated this 25th day of September, 1979.

Robert S. Campbell, Jr.

Chairman

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of March, 1981, three copies of the Reply Memorandum were mailed, postage prepaid, to Ray E. Christensen, attorney for respondent, 900 Kearns Building, Salt Lake City, Utah 84101 and three copies to Chris Wangsgard, 50 South Main, Salt Lake City, Utah 84144. I further certify that all parties required to be served have been served.

SAMUEL KING

301 Gump & Ayres Building
2120 South 1300 East
Salt Lake City, Utah 84106

Counsel for Petitioner